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Case No. _____

UNITED STATES SUPREME COURT
1984 Term

LEO L. MARTELON,

Petitioner,

v.

HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE; PAUL A. PARSONS; STEPHEN T. ERICKSON; and JAMES T. MILLER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

BARRY D. ROSEMAN
1634 Emerson Street
Denver, Colorado 80218
303/839-1771

Sander N. Karp
KARP & DODGE
1860 Blake Street, Suite 810
Denver, Colorado 80202
303/293-3996

Attorneys for Petitioner

25P

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner has a valid claim for monetary or injunctive relief under 42 U.S.C. §1983 for violation of his fourteenth amendment right to due process when he was terminated from his non-probationary National Guard civilian technician employment, without a hearing, during his term of military enlistment; and

2. Whether the Colorado Army National Guard had the authority under 32 U.S.C. §709(e) to terminate the Petitioner's National Guard technician employment solely because it had reassigned him militarily to a unit other than the one in which he was employed as a civilian technician.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LEO L. MARTELON, Petitioner,

v.

HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE, PAUL A. PARSONS, STEPHEN T. ERICKSON, and JAMES T. MILLER, Respondents.

PETITION FOR WRIT OF CERTIORARI

Leo L. Martelon petitions that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

REPORTS OF THE DECISIONS BELOW[1]

The Opinion of the Tenth Circuit Court of Appeals is reported at *Martelon v. Temple,* 747 F.2d 1348 (10th Cir. 1984), and appears in the Appendix (hereinafter, "Appendix") at 1-7.[2] The Order of the United States District Court for the District of Colorado, from which Petitioner had appealed to the Tenth Circuit, is reported at *Martelon v. Walker,*[3] 568 F.Supp. 672 (D.Colo. 1983), and appears at App. 9-11.

[1] All parties, with the exception of Emmett H. Walker (fn. 3, *infra*) are listed in the caption.

[2] Due to its length, the Appendix is printed under separate cover.

[3] Petitioner filed his Complaint against Emmett H. Walker in his official capacity as Director of the National Guard Bureau. After the District Court entered its Order, Major General Herbert R. Temple, Jr., succeeded General Walker in this position and was substituted as a party in the Tenth Circuit.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 8, 1984. A timely petition for rehearing was denied on December 7, 1984. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Section 1 of the fourteenth amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

32 U.S.C. §709(e)(1-3) provides:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from

his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;...

32 U.S.C. §101(10) provides:

> "Grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

Due to its length, Technician Personnel Regulation 302.7-3 (March 17, 1981) is set out verbatim in the Appendix. App. 15-16. The most pertinent portion reads:

a. The following are requisite for technician employment:

(1) All technicians must maintain appropriate military membership, military grade, and branch of service (except as provided for in paragraph 7-9) for the technician position occupied; meet the required military security standards; and meet the military physical requirements appropriate for the compatible military assignment.

(2) General officers may not be employed as technicians, unless a technician position description requires the incumbent to be a commander of a tactical combat unit.

(3) Technicians may not be assigned as Assistant/ Deputy Adjutant General.

b. Technicians who do not meet the above will be given a written 30-day advance notice of termination and promptly separated.

Due to its length, Technician Personnel Regulation 302.7-9 (March 17, 1981) is set forth verbatim in the Appendix. App. 17. The most pertinent portion reads:

> A National Guard technician must be assigned to an appropriate military unit (to include military grade and specialty) in the State where his technician job is located (see 32 U.S.C. 709(b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the same unit. Unless specifically approved by NGB-TN, the assignment will be in the unit by which employed, and the technician must be performing in the MOS/AFSC determined to be compatible with the technician position occupied. Situations of military or technician grade inversion are not permitted; i.e., a technician is subordinate to an individual in technician status but senior to him in a military status.

Due to its length, Technician Personnel Regulation 752.2-3 (August 16, 1982) is set out verbatim in the Appendix. App. 19. The most pertinent portion reads:

> a. When a technician can no longer meet the requirements of the technician position, removal from the position is required. This includes such situations where a technician loses flying status; is physically unable to perform his duties; fails to meet the security standards of his compatible military assignment; fails to meet the medical requirements of his technician position/compatible MOS/AFSC; or fails to maintain the military grade/rank, branch of service, or compatible military assignment for the technician position occupied.

National Guard Regulation 600-200, Par. 1-4.k. (September 1, 1978) provides: "k. Grade. Refers to pay grade, unless otherwise specified."

STATEMENT OF THE CASE

On November 3, 1974, Petitioner Leo L. Martelon commenced his employment as a civilian technician employed in the 220th Military Police Company of the Colorado Army National Guard (App. 2). Mr. Martelon previously had been informed in writing that his employment "is contingent upon membership in the Army National Guard" *(Id.)* and

had enlisted in the same unit two days before the effective date of the commencement of his civilian technician employment.

Mr. Martelon's term of military enlistment, which originally was only for one year, was extended twice—the first time until October 31, 1990; and the second time, until October 31, 1991. On the civilian side, his technician employment status was changed from a conditional to a non probationary appointment after he had satisfactorily completed a one-year probationary period. Mr. Martelon eventually received promotions as a civilian technician from a GS-5 to a GS-7 position.

On June 21, 1981, Respondent Stephen T. Erickson relieved Mr. Martelon's military unit commander of his military command of the 220th Military Police Company and relieved Mr. Martelon from his military assignment as First Sergeant of that unit, stating that Mr. Martelon would "assume the duties of Operations Sergeant in this headquarters." Written orders dated the same day stated that Mr. Martelon was being transferred to the 193rd Military Police Battalion headquarters.

Two days later, Mr. Martelon received a Notice of Separation, which stated that he was being separated from the technician force because of the loss of his military/technician compatibility. Specifically, this notice claimed, "Chapter 302.7 of Technician Personnel Regulation 300 and Title 32 U.S.C. 709e, requires a technician be compatible and militarily assigned to the same unit in which his/her technician job is located." Mr. Martelon's civilian technician employment was terminated effective August 1, 1981.

Respondents never provided Petitioner with a hearing with respect to the termination of his civilian technician employment. Mr. Martelon made several efforts to obtain a reversal or reconsideration of the military reassignment decision—including written communications with Respondent Erickson; with Respondent John L. France, the Adjutant General for the State of Colorado; and with Respondent Paul A. Parsons, then an intermediate-level commander—but he was not successful in any of these efforts.

Mr. Martelon then filed a Complaint in the District Court. The District Court had jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3). The Complaint included allegations that the involuntary military reassignment and the termination of Mr. Martelon's civilian employment were taken under color of state law and deprived Mr. Martelon of his constitutional rights to due process, in violation of 42 U.S.C. §1983;

and that the termination of his civilian technician employment was void because it was contrary to 32 U.S.C. §709(e). The Complaint requested reinstatement, back pay and benefits, compensatory and punitive damages, and attorney's fees and costs.

After extensive discovery, the parties filed cross-motions for summary judgment.[4] The District Court entered summary judgment for Respondents and against Petitioner, ordering dismissal of the action with prejudice. The District Court, relying upon *Gilligan v. Morgan,* 413 U.S. 1 (1973), concluded that Petitioner's §1983 claim "raises issues not appropriate for determination in this court," and that "[a] federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented." App. 10. The District Court further concluded that "a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian technician duties cannot be performed," and that the termination of Petitioner's employment was authorized by 32 U.S.C. §709(e)(1). App. 11. The District Court additionally concluded that "the Guard has the inherent power necessary to terminate a technician's employment if the technician's reassignment to a different military unit is incompatible with his or her civilian employment." *Id.*

The Tenth Circuit affirmed. It relied in part on this Court's decision in *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2363, 76 L.Ed.2d 586 (1983), even though the *Chappell* case involved a claim brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), while Petitioner's claim was brought pursuant to §1983. App. 3-4. The Tenth Circuit concluded that Petitioner's "§1983 claim has no merit," reasoning that "[b]efore the passage of §1983, there was no liability on the part of military superiors for transgressions against the rights of other military personnel. By the passage of §1983, Congress never intended to create such rights." App. 4-5.

The Tenth Circuit also concluded that the reason given for the termination of Petitioner's employment was authorized by 32 U.S.C. §709(e). It agreed with the District Court's holding that "a civilian technician

[4] Specifically, Respondents moved for summary judgment, and Petitioner moved for partial summary judgment. Petitioner maintained that, even if the District Court entered summary judgment in his favor on the major issues of liability, there existed genuine issues of material fact on individual liability, immunity, and the amount of damages and back pay and benefits.

ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian duties cannot be performed," App. 7, and therefore Respondents were authorized to terminate Petitioner's employment without any hearing under the provisions of 32 U.S.C. §709(e)(1) dealing with loss of military grade.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION THAT A NATIONAL GUARD TECHNICIAN HAS NO VALID §1983 CLAIM FOR THE TERMINATION OF HIS TECHNICIAN EMPLOYMENT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

Three circuits have entertained actions under 42 U.S.C. §1983 to protect technicians' due process rights in connection with the termination of their civilian employment. The Fifth Circuit articulated the legal conclusion central to all of these decisions in holding that, while a technician "was a military member of the Georgia Air National Guard otherwise eligible for continued employment under 32 U.S.C. §§ 709(e)(1) and (2), he had a protected property interest in his civilian employment that could not be denied absent a justified finding of 'cause' for removal following a due process hearing." *NeSmith v. Fulton,* 615 F.2d 196, 200 (5th Cir. 1980). The Fifth Circuit earlier had held, relying on this Court's decision in *Arnett v. Kennedy,* 416 U.S. 134 (1974), that a post-discharge hearing satisfied a National Guard technician's due process rights. *Davis v. Vandiver,* 494 F.2d 830 (5th Cir. 1974).[5]

The Third Circuit also has recognized a technician's right to bring a §1983 claim to protect his constitutional rights. *Lasher v. Shafer,* 460 F.2d 343 (3d Cir. 1972). In concluding that probationary technicians are not entitled to the same due process protections as technicians who have completed their probationary employment, the Third Circuit found that

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[5] Petitioner is aware that this Court has granted certiorari and heard oral argument in three consolidated cases involving the issue of whether school districts must grant pretermination evidentiary hearings for civil service employees. *Cleveland Board of Education v. Loudermill,* Docket No. 83-1362; *Parma Board of Education v. Donnelly,* Docket No. 83-1363; *Loudermill v. Cleveland Board of Education,* Docket No. 83-6392. That is not the central issue in this case. Rather, the issue is whether Respondents violated Petitioner's due process rights by not holding or offering *any* hearing in connection with the termination of his employment.

the "termination for cause" provision in 32 U.S.C. §709(e)(3) accorded all nonprobationary technicians "an assurance of continuing employment similar to that given other federal employees." *DiLuigi v. Kafkalas,* 584 F.2d 22, 25 (3d Cir. 1978) *cert. denied,* 440 U.S. 959 (1979).

The Sixth Circuit, following *Lasher,* has held that the termination of National Guard technicians' employment constitutes action under color of state law and that such technicians therefore stated §1983 claims based on these personnel actions. *Rowe v. State of Tennessee,* 609 F.2d 259 (6th Cir. 1979); *Schultz v. Wellman,* 717 F.2d 301, 304-06 (6th Cir. 1983).

The decisions in these other Circuits are diametrically opposed to the Tenth Circuit's conclusions in this case. This majority view is also supported by this Court's opinion in *Tennessee v. Dunlap,* 426 U.S. 312 (1976), another §1983 case. *See Dunlap v. State of Tennessee,* 514 F.2d 130, 131 (6th Cir. 1975). This Court held that a National Guard technician was not entitled to either a hearing or a copy of charges against him when the Guard terminated his technician employment under §709(e)(1) because he had ceased to be a military member of the National Guard. This Court implied that a technician in Petitioner's situation is entitled to due process protection in connection with the termination of his or her employment when it stated that §709(e)(3) cannot "provide the foundation for any due process claim in this case, since the property interest it creates in continued employment is confined, in all events, to the guardsman's term of enlistment." 426 U.S. at 316.

The Tenth Circuit's decision in this case is in conflict with the decisions of these other Circuits. Petitioner was a nonprobationary technician whose employment was terminated more than ten years before the scheduled end of his enlistment, *see* discussion *supra* at 5, and who therefore had not been separated from the National Guard. 32 U.S.C. §709(e)(1). Nor was Petitioner's security clearance involved in the termination of his technician employment. *See* 32 U.S.C. §709(e)(2). As discussed *infra* at 13-15, his involuntary military reassignment to a different unit did not cause him to lose the "military grade" required for his position. 32 U.S.C. §709(e)(1). The only other statutory ground for terminating Petitioner's employment was the "separation for cause" provisions of §709(e)(3), but this would require that Petitioner be afforded a hearing. *Davis v. Vandiver, supra.* Although Petitioner

received no hearing even after his discharge, the Tenth Circuit concluded that Petitioner's "§1983 claim has no merit." App. 5.

Petitioner submits that this Court should review this decision to resolve this conflict in the Circuits. If it does not, National Guard technicians employed within the geographic boundaries of the Tenth Circuit will be denied the same right to bring §1983 claims as is enjoyed by technicians employed within the geographic limits of the Third, Fifth, and Sixth Circuits. This Court should establish a uniform rule requiring due process and providing a means to enforce these rights, for all National Guard technicians.

II. THE TENTH CIRCUIT'S REASONS FOR DENYING PETITIONER'S §1983 CLAIM CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In *Chappell v. Wallace, supra,* this Court held that "it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." 103 S.Ct. at 2367. It decided, however, to "leave it for the Court of Appeals to decide on remand whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioners in violation of 42 U.S.C. §1985(3) can be maintained." 103 S.Ct. at 2368, n. 3.

Different Circuits have applied the *Chappell* decision to Reconstruction-era civil rights statutes in different ways. The Sixth Circuit's decision in *Schultz v. Wellman, supra,* though handed down after *Chappell,* did not discuss the possible effect of this decision. In contrast, the Ninth Circuit concluded that "military officers may not sue their superiors under §1985(1), at least where the §1985(1) claim involved only the alleged violation of a statute." *Mollnow v. Carlton,* 716 F.2d 627, 630-32 (9th Cir. 1983).[6] Another panel of the Ninth Circuit decided not to apply *Chappell* directly to bar a §1981 racial discrimination claim brought by a United States Army Captain, *Gonzales v. Dept. of Army,* 718 F.2d 926, 929-30 (9th Cir. 1983), choosing instead to conclude that judicial review of the military decisions involved in that

[6] The Ninth Circuit noted that it was "not faced with the question of whether a statutory claim based on a constitutional violation is subject to the result announced in *Chappell.*" 716 F.2d at 631. Petitioner's §1983 allegations involve the precise category of claims not addressed in *Mollnow.*

case was inappropriate under the standards set forth in *Mindes v. Seaman,* 453 F.2d 197 (5th Cir. 1971).[7]

Meanwhile, the Eighth Circuit, in *Brown v. United States,* 739 F.2d 362, 367 (8th Cir. 1984), stated in *dictum* that it could not find "a reasoned distinction for the purposes of the *Feres*[8] doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute." The Eighth Circuit, however, held in *Brown* that a National Guardsman could bring §§1981 and 1983 claims for racial assault and harassment against fellow guardsmen for their activities at an on-base weekend drinking party.

The Tenth Circuit took a different approach in this case. It discussed this Court's opinion in *Chappell,* including the language in that opinion stating: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." 103 S.Ct. at 2365. The Tenth Circuit went on to discuss the citation in *Chappell* to this Court's earlier opinion in *Feres v. United States, supra,* and the holding in the *Feres* decision. App. 4. It then concluded, reasoning by analogy from one of the grounds used by this Court to support its decision in *Feres, supra,* that there allegedly was no pre-§1983 "liability on the part of military superiors for transgressions against the rights of other military personnel;" that Congress "never intended to create such rights" in enacting §1983; and that, therefore, Petitioner had no valid §1983 claim. App. 5.

These decisions have chosen widely divergent approaches in deciding whether and to what extent this Court's opinion in *Chappell* applies to actions under the Civil Rights Acts. Different decisions have refused to apply *Chappell,* have held that it applies under certain circumstances, applied it as a factor on the issue of reviewability, and used it as a guide for ascertaining the intent of the 42nd Congress in enacting §1983. It is impossible to predict what approaches might be followed in future decisions and whether a dominant line of authority will emerge. Under these circumstances, this Court should exercise its power of supervision

[7] The Ninth Circuit's decision in the *Chappell* case, *Wallace v. Chappell,* 661 F.2d 729 (9th Cir. 1981)—which this Court reversed—had relied in part on the *Mindes* case. The *Gonzales* opinion cited this Court's decision in *Chappell* to support the Ninth Circuit's conclusion on nonreviewability under the *Mindes* standards. 718 F.2d at 930.

[8] *Feres v. United States,* 340 U.S. 135 (1950).

to resolve the question it left open in *Chappell v. Wallace, supra,* to establish a uniform approach on this issue.

Even if this problem did not exist, the Tenth Circuit's decision in this case so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. At least four reasons militate in favor of this Court's intervention in this case.

First, the Tenth Circuit implied that the only difference between *Chappell* and this case "is due to the identity of the defendants." App. 4. In *Chappell,* this Court held that it would not extend the scope of a judicially created damage remedy in a way that "would be plainly inconsistent with Congress' authority in this field," 103 S.Ct. at 2367; in contrast, this case involves judicial interpretation of the scope of a remedy created by Congress. This distinction between judicial self-restraint and statutory interpretation mirrors another central principle of *Chappell*—that courts should hesitate to interfere with Congress' "plenary constitutional authority over the military." *Id.* at 2366. Here, Congress carefully balanced the civilian and military aspects of technician employment. On the one hand, it required part-time military membership for most technicians, including appropriate military grade and security clearance. On the other hand, it permitted termination only "for cause"—the most fundamental right of civilian public employees—of technicians who meet these military requirements. The Tenth Circuit's decision in this case alters this carefully crafted Congressional scheme by approving termination of technicians' employment without a hearing for a reason not specified in §709(e), thereby effectively eviscerating the termination "for cause" protections in this statute.

Further, the remedies created by Congress in the Uniform Code of Military Justice, upon which this Court relied in *Chappell,* do not apply to National Guard personnel who are not in the active federal service. 10 U.S.C. §802(3); *Rasmussen v. Seamans,* 432 F.2d 346 (10th Cir. 1970). Nor, unlike the *Chappell* plaintiffs, could the correction of Petitioner's military records have provided him with any meaningful relief in this case, since the Board for Correction of Army Records could not have ordered petitioner to be reinstated in his civilian employment. *See Rolles v. Civil Service Comm'n,* 512 F.2d 1319, 1326-27 (D.C. Cir. 1975). Moreover, the Tenth Circuit apparently assumed that every §1983 claim would have a disruptive effect on military discipline, rather than analyzing carefully whether the specific relief that Petitioner seeks in this

case — legal and injunctive relief based on his deprivation of a hearing — would have this same effect.

Second, the Tenth Circuit's decision was historically inaccurate in concluding that "[b]efore the passage of §1983, there was no liability on the part of military superiors for transgressions against the rights of other military personnel." App. 4-5. Before 1871, this Court had held that a military superior officer was liable for an intentional tort against a seaman under his command if the superior officer's actions were done "from malice to an individual, or a vindictive feeling, or a disposition to oppress..." or if such actions were "forbidden by law, or beyond the power which the law confided to him." *Wilkes v. Dinsman,* 7 How. (48 U.S.) 89 (1849); *Dinsman v. Wilkes,* 12 How. (53 U.S.) 389, 404 (1851).

Third, the Tenth Circuit's opinion in this case was historically inaccurate in concluding that "Congress never intended to create such rights" in enacting §1983. Its citation to this Court's opinion in *Allen v. McCurry,* 449 U.S. 90, 98-99 (1980), apparently is to a passage in that opinion referring to the Congressional intent "to override the corrupting influence of the Ku Klux Klan and its sympathizers in the governments and law enforcement agencies of the Southern States." Neither Congress nor this Court has given such a narrow interpretation to §1983, originally enacted at §1 of the Civil Rights Act of 1871. "By enacting a remedy to all people, including whites, §1 went beyond the mischief to which the remaining sections of the 1871 act were addressed." *Monell v. Dept. of Social Services,* 436 U.S. 658, 683 (1978). *See generally* the remarks of Representative Samuel Shellabarger, quoted in *Owen v. City of Independence,* 445 U.S. 622, 636 (1980).

Fourth, the Tenth Circuit drew no distinction between Petitioner's claims for legal and injunctive relief. In *Chappell,* this Court stated that it "has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 103 S.Ct. at 2367. The three cases this Court cited in support of this proposition all involved actions for injunctive relief, in which this Court reviewed the claims of military personnel on their merits. *Brown v. Glines,* 444 U.S. 348 (1980); *Parker v. Levy,* 417 U.S. 733 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973). The Tenth Circuit seems to have established a *per se* rule against §1983 claims for injunctive and monetary relief by National Guard technicians or military personnel against their superiors, thereby going far beyond this Court's prior decisions in this area.

III. THE TENTH CIRCUIT'S DECISION ON PETITIONER'S STATUTORY CLAIM SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

One of Petitioner's claims, both in the District Court and in the Tenth Circuit, was that Respondents had no authority under 32 U.S.C. §709(e) to terminate his civilian technician employment merely because they had changed his part-time military assignment to a different unit than the one in which he was employed as a technician. The Tenth Circuit held that Respondents did have this statutory authority under §709(e)(1), since this military transfer allegedly caused Petitioner to lose "the military grade specified for his position." App. 5.

This conclusion is manifestly erroneous. Congress expressly defined the term "military grade" to mean "a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation." 32 U.S.C. §101(10). National Guard Regulation 600-200, Para. 1-4.k. (September 1, 1978) similarly defined the term "grade" to refer "to pay grade, unless otherwise specified." Nowhere in §709, indeed nowhere in Title 32 of the United States Code, is the term "military grade" defined as meaning the military unit in which a National Guard officer or enlisted person is serving.

The Tenth Circuit's definition of "military grade" violates extremely basic canons of statutory interpretation. "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States,* 242 U.S. 470, 490 (1917). If statutory language is unambiguous, then, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Comm'n. v. GTE Sylvania,* 447 U.S. 102, 108 (1980); *United States v. Turkette,* 452 U.S. 576, 580 (1980).

Moreover, the Tenth Circuit misstated the Congressional intent in enacting §709. The Tenth Circuit relied in part on language in the Report of the Senate Armed Services Committee, which stated, "It is the view of the Committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position." S.Rep. No. 1446, 90th Cong., 2d Sess. at 20 (1968). This language,

however, appeared in the "Committee Observations" section of the Senate Report, stating the Committee's views on subjects that were "not dealt with in explicit language in the bill." *Id.* at 19. No similar language appears in the House Report, 1968 U.S. Code Cong. & Admin. News 3318, nor in the debates on the floor of either the House or the Senate. The only other legislative citations in the Tenth Circuit's decision in this case are citations to very general language dealing with the multiple ways in which National Guard technicians carry out their public service, and which do not discuss either the general question of military/technician compatibility or the more specific issue of whether such compatibility is a condition of technician employment. In other words, there is no evidence that a majority of the House and Senate, as opposed to a majority of the members of one Senate committee, supported a strict requirement of military unit/technician compatibility.

The Tenth Circuit's decision in this case even misinterpreted the policy objective of the Senate Armed Services Committee. The Report of this Committee noted, in a sentence not quoted by the Tenth Circuit, "[T]he committee did learn in some instances technicians hold military assignments in units different from the units in which they are employed." S.Rep. No. 1446, 90th Cong. 2d Sess. at 20 (1968). The clear purpose of this Committee report was to prompt the National Guard to correct this situation. No indication exists that the Senate Armed Services Committee, let alone the entire Senate or House, intended the solution to be the peremptory removal of all incompatibly assigned technicians.

Nor do the regulations cited by the Tenth Circuit support its decision in this case. The Tenth Circuit claimed that Petitioner "was terminated under Technician Personnel Regulation 302.7-9," App. 5, yet this regulation said nothing about termination of technicians who failed to meet the compatibility standards set forth therein. The "Employment Policy" provision of this same regulation, Technician Personnel Regulation 302.7-3, did not authorize the termination of a technician's employment for lack of military/technician compatibility and, in fact, did not even mention this subject. The Tenth Circuit further claimed that Technician Personnel Regulation 752.2-3 (August 16, 1982) "mandates removal of technician employment" for lack of compatibility, App. 6. Yet this regulation went into effect more than one year after the termination of Petitioner's employment.

Even assuming *arguendo* that these regulations are valid and authorized the termination of Petitioner's employment, the Tenth Circuit ignored the fact that Respondents violated these regulations in reassigning Petitioner to a different military unit. Clearly, these regulations required the National Guard to assign technicians to compatible military and civilian positions; Technician Personnel Regulation 302.7-9, for example, states that "[a] National Guard technician *will be assigned* to an appropriate military unit" (emphasis supplied). Respondents not only violated these regulations by reassigning Petitioner in an incompatible fashion, but then argued that their own violations mandated the termination of Petitioner's employment. An agency's failure to comply with its own regulations renders its actions contrary to law. *Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

The decision of the Tenth Circuit in this case will have an impact on far more people than merely the Petitioner. Congress has provided that, with the exception of the narrowly limited circumstances described in subsections (1) and (2) of 32 U.S.C. §709, the National Guard can terminate a nonprobationary technician's employment only "for cause" and, as other Circuits have held, only after a hearing. If the Tenth Circuit's decision is allowed to stand, an enormous loophole in this statutory scheme would result: National Guard personnel could avoid the inconvenience and uncertainty of a hearing merely by reassigning a technician to a different military unit and then terminate that technician's employment for loss of compatibility. This would eviscerate the "for cause" protections in §709(e)(3), with great consequences for the morale of the more than 55,000 technicians employed nationwide.

CONCLUSION

For the reasons stated herein, Petitioner Leo L. Martelon requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

BARRY D. ROSEMAN
1634 Emerson Street
Denver, Colorado 80218
303/839-1771

Sander N. Karp
KARP AND DODGE
1860 Blake Street, Suite 810
Denver, Colorado 80202
303/293-3996

Attorneys for Petitioner